future acid mine drainage is to scrutinize proposed mining permits for their acid drainage potentials and deny permits to those with higher potentials. For proposed mines with lower acid drainage potentials, funding from the site-specific bonds, Special Reclamation Fund or other alternative sources should be increased to amounts to provide for the contingency of long-term treatment."

Response: As discussed in finding A.1.b.(2), the Director is requiring West Virginia to amend its program to provide for the treatment of polluted water discharging from all bond forfeiture sites.

Also, as discussed in finding A.1.b.(4)(c), the Director disapproved the proposal that would allow the special reclamation fund to incur a deficit. Furthermore, as discussed in finding C., the Director found the State's alternative bonding system is not achieving the objectives and purposes of the conventional bonding program as set forth in section 509 SMCRA, and he is requiring the State to eliminate the deficit in the State's alternative bonding system and to ensure that sufficient money will be available to complete reclamation, including treatment of polluted water, at existing and future bond forfeiture sites.

2. Comment: EPA also expressed concern about the potential for acid seepage from backfills after Phase I bond is released pursuant to the provisions of section 12.2(c)(1), where 60 percent of the total bond may be released. EPA recommended that "Phase I bond release for mines with acid potential be delayed for a year or sufficient period after backfilling to determine if acid seepage will occur." EPA further recommended withholding of the entire bond if acid seepage did occur after this period.

Response: The Director finds that EPA's recommendations have merit. However, nothing in SMCRA or the Federal regulations require Phase I bond release to be delayed in order to determine if acid seepage will occur. It should be noted that compliance with the State's existing toxic handling and hydrologic reclamation plan requirements should prevent postmining acid seeps from occurring. Further, subsection 14.7(d) provides that after treatment facilities are removed, a one-year history of meeting applicable effluent limitations is required to establish that the hydrologic balance is being preserved.

State Historical Preservation Officer and the Advisory Council on Historic Preservation (ACHP)

Pursuant to 30 CFR 732.17(h)(4), OSM solicited comments on the proposed amendment from the West Virginia Division of Culture and History and the ACHP on four different occasions (Administrative Record Nos. WV–891, WV–897, WV–936, and WV–942). Neither agency commented on the proposed amendment.

V. Director's Decision

Based on the above findings, the Director is approving with certain exceptions and additional requirements the proposed amendment as submitted by West Virginia on June 28, 1993, as modified on July 30, 1993; August 18, 1994; and September 1, 1994, and May 16, 1995. As discussed in the findings, there are some exceptions to this approval. The Director also is requiring the State to make additional changes to certain provisions to ensure that the program is no less stringent than SMCRA and no less effective than the Federal regulations.

As discussed in findings A.1.b.(1) and B.10.a., the Director is approving those portions of § 22–3–11(g) of WVSCMRA and CSR § 39–2–12.5 that concern prioritization of forfeited sites only to the extent that these provisions authorize the ranking and prioritization of bond forfeiture sites for reclamation purposes. Nothing in this decision shall be construed as compromising the requirement that all bond forfeiture sites be properly reclaimed in a timely manner.

In addition, as discussed in findings A.1.b.(2), A.1.b.(4)(c), and B.10.b., the Director is not approving $\S\,22-3-11(g)$ of WVSCMRA and CSR $\S\,39-2-12.5(d)$ to the extent that they limit expenditures on water treatment at bond forfeiture sites to 25 percent of the assets of the special reclamation fund and authorize collection of the special reclamation tax only when the fund's liabilities exceed its assets.

As discussed in finding A.1.b.(3), the Director is approving § 22–3–11(g) of WVSCMRA concerning administrative expenses only to the extent that the special reclamation fund can withstand all authorized administrative cost withdrawals without hampering the State's ability to complete the reclamation of bond forfeiture sites in a timely manner and in accordance with their approved reclamation plans.

As discussed in finding B.5., the Director is approving CSR § 38–2–11.6 with the stipulation that nothing in these regulations or this approval may

be construed as altering or authorizing a variance or deviation from the permitting requirements and performance standards of the approved West Virginia program.

The Director is amending 30 CFR Part 948 to codify this decision. Under 30 CFR 732.17(g), no changes in State laws or regulations may take effect for purposes of the State program unless and until they are approved as a program amendment. With respect to those changes in State laws and regulations approved in this document, the Director is making the effective date of his approval retroactive to the date upon which they took effect in West Virginia for purposes of State law. He is taking this action in recognition of the extraordinarily complex nature of the review and approval process for this particular amendment, the significance of its provisions to the adequacy of the alternative bonding system, and the need to affirm the validity of State actions taken during the interval between State implementation and the decision being announced today. Retroactive approval of these provisions is in keeping with the purposes of SMCRA relating to State primary and environmental protection.

To assure consistency with 30 CFR 732.17(g), which states that "[no] * * * change to laws or regulations shall take effect for purposes of a State program until approved as an amendment," the Director's approval of the revisions, as noted in the codification below, includes West Virginia's previous and ongoing implementation of these revisions. The changes approved in this rulemaking strengthen the West Virginia program and, as such, are consistent with SMCRA and the Federal regulations at 30 CFR 732.17(g).

Retroactive approval of the revisions is appropriate because no detrimental reliance on the previous West Virginia laws or regulations has occurred for the period involved. OSM is approving these changes back only to the dates from which West Virginia began enforcing them. As support for his decision, the Director cites the rationale employed by the United States Claims Court in McLean Hosp. Corp. v. United States, 26 Cl. Ct. 1144 (1992). In *McLean,* the Court held that retroactive application of a rule was appropriate where the rule was identical in substance to guidelines which had been in effect anyway during the period in question. Therefore, the Court concluded, the plaintiff could not "claim that it relied to its detriment on a contrary rule." 26 Cl. Ct. at 1148. Likewise, since the Director is approving changes which the State has